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NO.

in the Supreme Court of the United States

RUSSELL HOBSON

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED

Whether petitioner was improperly denied his constitutional right to counsel of his choice by the disqualification of his trial counsel.

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Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above-styled cause on February 20, 1982, with written opinion filed on March 24, 1982, and rehearing en banc denied May 12, 1982.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is printed at ____F.2d ____, and is printed in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 20, 1982, with the written opinion following on March 24, 1982. En banc rehearing was denied May 12, 1982. The jurisdiction of this court is invoked under 28 U.S.C. §1254.

Petitioner submits this issue is ripe for review inasmuch as this is an issue that could continue to occur but always be capable of evading review. *Roe v. Wade*, 410 US 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

STATEMENT OF THE CASE

Petitioner was charged, along with co-defendants, with various drug related offenses. Subsequently, Petitioner's chosen attorney was disqualified from the representation of Petitioner on such charges. The disqualification of Petitioner's chosen attorney was affirmed by the United States Court of Appeals, Eleventh Circuit, on February 20, 1982 and the opinion was later filed on March 24, 1982. Rehearing en banc was denied on May 12, 1982. This Petition for Writ of Certiorari in the United States Supreme Court follows.

STATEMENT OF THE FACTS

Petitioner was charged, along with co-defendants, with various drug related offenses. Eight weeks before trial on such charges, Petitioner's counsel of choice was disqualified. The disqualification of counsel was affirmed by the United States Court of Appeals, Eleventh Circuit, on February 20, 1982 by a 2-1 decision and the opinion, including the dissenting opinion, followed on March 24, 1982. The following findings of facts were made by the panel:

The disqualification of Petitioner's chosen counsel was based upon affidavits of two government witnesses, Robinson and Alexander. The affidavit of Robinson reflects that he met Alexander in the office of Petitioner's counsel while he was at such office to discuss pending litigation in which the attorney was representing him. Both affidavits purport to show that a future marijuana shipment was discussed between the two affiants during such meeting and Alexander's affidavit suggests that it was his opinion that the attorney had knowledge of the context of their discussion. The marijuana shipment referred to was alleged in the indictment to have been one in which Petitioner was a co-conspirator.

The dissenting opinion recognized that both Robinson and Alexander were convicted felons and that Robinson's affidavit conflicted with his grand jury testimony. The dissenting opinion also recognized that the affidavits conflicted as to the time at which the meeting in the attorney's office occurred. Moreover, it was pointed out by the dissent that the attorney was concededly not a target of a government investigation nor would he be called as a

witness to testify against his client, Petitioner. Furthermore, the dissent noted that the evidence against the attorney was given ex parte and that no hearing was held to test the accuracy of such evidence.

On the basis of the affidavits, however, the majority affirmed the disqualification of Petitioner's counsel on the grounds that a possibility of the appearance of impropriety was created and that such testimony regarding Petitioner's counsel could be detrimental to Petitioner. The majority recognized that Petitioner was willing to waive any problems created by the affidavits in order to have the benefit of his attorney's continued representation.

ARGUMENT

PETITIONER WAS IMPROPERLY DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL OF HIS CHOICE BY THE DISQUALIFICATION OF COUNSEL.

The Sixth Amendment of the United States Constitution has long been interpreted by this Court to afford a criminal defendant the right to counsel of one's choice. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Concededly, this right is not absolute, but, as recognized by the dissenting opinion of the court below, such right is compelling. *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975). In deciding the case at bar, the Eleventh Circuit sought guidance from this Court due to the absence of authority within that circuit.

The court below found a split of authority within its predecessor, the former Fifth Circuit, as to the standard of review to be applied in appeals from disqualification orders. However, the court below noted the absence of Supreme Court authority on this issue. Moreover, the instant case was ultimately resolved without any guidance from this Court as to the standard of review to be applied in such appeals or the weight to be accorded a defendant's right to choice of counsel against bare and conflicting allegations of impropriety of counsel.

Clearly, the constitutional right to counsel of one's choice is an issue of such importance to merit this Court's attention and resolution of the weight to be granted to such choice in disqualification decisions.

In *Woods v. Covington County Bank*, 537 F.2d 804

(5th Cir. 1976), the Court enunciated a two-prong test for determining whether an attorney may be disqualified on the ground of the appearance of impropriety in violation of Canon 9 of the Code of Professional Responsibility. The *Woods* court established that in order for an attorney to be disqualified under the appearance of impropriety, first, "there must be at least a reasonable possibility that some specifically identifiable impropriety did in fact occur." *Id.* at 813. Second, "a court must also find that the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case." *Id.* at 813, n. 12. "An attorney should be disqualified only when both of [the above] standards have been satisfied." *Id.*

Furthermore, the *Woods* court recognized that an overly broad application of Canon 9 would ultimately be self-defeating. *Id.* at 813. The court reasoned that under a broad application, a litigant would often be unfairly denied the counsel of his choice and stated:

> Indeed, the more frequently a litigant is delayed or otherwise disadvantaged by the unnecessary disqualification of his lawyer under the appearance of impropriety doctrine, the greater the likelihood of public suspicion of both the bar and the judiciary. *Id.*

Petition submits that disqualification in this instant was an overly broad application of the appearance of impropriety doctrine and, as noted by the dissent, "a thorough examination of the 'balance' reached indicates a serious abrogation of the defendant's constitutional rights".

In responding to the dissent filed by Judge Kravitch in this case, the majority reasoned that Petitioner's right to counsel of choice was only partially affected by the disqualification as Petitioner was represented by two attorneys prior to disqualification. Petitioner submits that the record clearly reveals that the attorney disqualified was the counsel chosen for representation on the charges against him and that Petitioner considered the second attorney as a "personal advisor" rather than trial counsel.

Moreover, Petitioner submits that disqualification of counsel in the instant case did nothing to protect the public's confidence in the legal profession. The testimony regarding the alleged meeting in Petitioner's attorney's office would have been given whether the disqualified attorney was representing Petitioner or not. Surely members of the jury and the public generally are able to evaluate testimony in light of all the circumstances. The most obvious question raised by such testimony as given in the two affidavits is whether any of it is credible. The jury was ultimately asked to resolve that issue anyway. Apparently, neither the government nor the grand jury found such testimony credible inasmuch as no charges were brought against the disqualified attorney nor was he the target of any investigation. Moreover, the testimony regarding the attorney was irrelevant as he was not on trial. Thus, there was no need to rebut the testimony.

The courts in *Woods, supra* and other cases involving disqualification under the appearance of impropriety doctrine have revolved around whether it "appeared" that another ethical canon may be violated. See *United States v. Kitchen*, 592 F.2d 900 (5th Cir. 1979); *Hull v. Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975); *Davis v. Stamler*,

650 F.2d 477 (3d Cir. 1981); *In Re Taylor*, 567 F.2d 1183 (2d Cir. 1977); *In Re Corrugated Container Anti-Trust Litigation*, 659 F.2d 1341 (5th Cir. 1981).

In the case at bar, however, the Eleventh Circuit chose a novel approach to disqualification of Petitioner's attorney and applied the appearance of impropriety doctrine without reliance on the "appearance" of any other violation of ethical standards. In effect, the court determined that there was reason to believe that Petitioner's attorney may have acted improperly and that such reason outweighed Petitioner's constitutional right to choice of counsel. On this point, Petitioner adopts the reasoning of the dissent wherein it was stated,

> [I]f the meager evidence presented here supports the 'drastic action' of disqualification and consequent limitations of the constitutional rights to counsel of one's choice, I find it difficult to envision under what circumstances the social interests of an attorney's continued representation will outweight the risk of suspicion presented by an asserted conflict. *App. 8*

Certainly, such balancing of the right to choose one's counsel against the public's perception of an attorney is of great importance and thus, deserving of resolution by this Court. Under the holding of the court below, it becomes increasingly difficult to imagine any situation where any bare, unsupported and untested allegations against an attorney would not mandate disqualification.

Furthermore, it was inherent in the opinion of the court below and the trial court's order of disqualification that the "asserted conflict," referred to by the dissent,

was also a basis for disqualification. The logical development of the asserted conflict found to exist between Petitioner and his chosen counsel is hopelessly circuitous. On the one hand, it appears that the courts below reasoned that the "appearance of impropriety" of Petitioner's counsel would detrimentally affect Petitioner, thus creating a conflict between Petitioner and his attorney. On the other hand, it seems as though the court reasoned that the apparent conflict between Petitioner and his attorney would create the "appearance of impropriety." Regardless of the approach, a combination of the two arguments or a betwixt and between basis of a conflict, the ultimate decision is whether Petitioner may receive sound legal advice from his chosen attorney. This decision rests squarely on whether the attorney is able to exercise independent professional judgment on behalf of the client, in this case, Russell Hobson, as required by Canon 5.

The adjudication of this type conflict rests with the client upon full disclosure of its underlying basis. *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975); *In Re Taylor*, 567 F.2d 1183 (2d Cir. 1977).

After full disclosure of the type conflict presented here, the client is then free to waive the conflict and proceed with representation as originally chosen. *Id.* The *Taylor* court reasoned that once the court is satisfied that such waiver is knowingly and intelligently made, "it [the court] is without power unilaterally to obstruct the choice of counsel." *Id.* at 1191. Petitioner clearly waived any conflict created between himself and his chosen counsel. Therefore, the opinion of the court below is in total conflict with prior decisions of United States Courts of Appeal, Fifth Circuit and Second Circuit. Indeed, the court in *In Re*

Corrugated Container Anti-Trust Litigation, 659 F.2d 1341, 1349 (5th Cir. 1981) stated that:

> There may be come situations where the client has so clearly consented that disqualification would raise more public suspicion than it would quell.

Petitioner submits that the disqualification in this case is the type of situation envisioned by the court when the above statement was made.

In this case, the unique experiences of Russell Hobson's chosen trial counsel in trying many of the underlying cases to this case, including extensive cross-examination of key government witnesses, etc. was totally obviated by the disqualification of this particular attorney . . . to the direct detriment of Petitioner in violation of his fundamental Sixth Amendment right to counsel of choice.

CONCLUSION

For the above and foregoing reasons and authorities cited herein, it is respectfully requested that this Honorable Court grant its Writ of Certiorari and enter its order quashing the decision hereby sought to be reviewed and grant such other and further relief as seems right and appropriate to this court, including a new trial.

Respectfully submitted,

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